

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1384(L)

APPALACHIAN VOICES; WILD VIRGINIA; WEST VIRGINIA RIVERS
COALITION; PRESERVE GILES COUNTY; PRESERVE BENT MOUNTAIN, a
chapter of Blue Ridge Environmental Defense League; WEST VIRGINIA
HIGHLANDS CONSERVANCY; INDIAN CREEK WATERSHED
ASSOCIATION; SIERRA CLUB; CHESAPEAKE CLIMATE ACTION
NETWORK; CENTER FOR BIOLOGICAL DIVERSITY;

Petitioners

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DEB HAALAND, in her
official capacity as Secretary of the U.S. Department of the Interior; UNITED
STATES FISH AND WILDLIFE SERVICE, an agency of the U.S. Department of
Interior; CINDY SCHULZ, in her official capacity as Field Supervisor, Virginia
Ecological Services, Responsible Official; MARTHA WILLIAMS, in her official
capacity as Director of the U.S. Fish and Wildlife Service;

Respondents

and

MOUNTAIN VALLEY PIPELINE, LLC;

Intervenor

No. 23-1592

THE WILDERNESS SOCIETY

Petitioners

v.

UNITED STATES FOREST SERVICE; HOMER L. WILKES, in his official capacity as Under Secretary for Natural Resources and Environment; U.S. DEPARTMENT OF AGRICULTURE; KENDERICK ARNEY, in his official capacity as Regional Forester of the Southern Region;

Respondents

and

MOUNTAIN VALLEY PIPELINE, LLC;

Intervenor

No. 23-1594

THE WILDERNESS SOCIETY;

Petitioners

v.

BUREAU OF LAND MANAGEMENT; DEB HAALAND, in her official capacity as Secretary of the U.S. Department of the Interior; MITCHELL LEVERETTE, in his official capacity as State Director, Bureau of Land Management, Eastern States;

Respondents

and

MOUNTAIN VALLEY PIPELINE, LLC;

Intervenor

UNOPPOSED JOINT MOTION TO EXPAND ORAL ARGUMENT TIME

In accordance with Local Rule 34(d) of the Federal Rules of Appellate Procedure, the Petitioners in Consolidated Petitions for Review Nos. 23-1384(L), 23-1592, and 23-1594, jointly request an expansion of the time allotted for oral argument to 30 minutes per side, for a total argument time of one hour. Federal Respondents and Intervenor take no position on Petitioners' request. In support of their request, the Petitioners assert the following:

1. On February 23, 2023, the United States Fish and Wildlife Service ("FWS") issued a third Biological Opinion and Incidental Take Statement ("BiOp") for the Mountain Valley Pipeline under the Endangered Species Act. No. 23-1384(L), Doc. No. 3, Ex. A.
2. On April 10, 2023, ten environmental groups (Appalachian Voices, Wild Virginia, West Virginia Rivers Coalition, Preserve Giles County, Preserve Bent Mountain, West Virginia Highlands Conservancy, Indian Creek Watershed Association, Sierra Club, Chesapeake Climate Action Network, and Center for Biological Diversity), represented by lawyers from three different organizations

(Sierra Club, Appalachian Mountain Advocates, Inc., and Center for Biological Diversity) filed a petition seeking review of the BiOp under 15 U.S.C. §717r(d)(1). *Id.*

3. On May 15, 2023, the United States Forest Service issued a record of decision, authorizing construction of the Mountain Valley Pipeline through the Jefferson National Forest by purporting to amend the Revised Land and Resource Management Plan for that forest and providing a necessary concurrence to the Bureau of Land Management. No. 23-1592, Doc. No. 2, Ex. A.

4. On May 17, 2023, the Bureau of Land Management (“BLM”) issued its own record of decision, granting Intervenor Mountain Valley Pipeline, LLC, a right-of-way across the Jefferson National Forest and a permit for construction. No. 23-1594, Doc. No. 2, Ex. A.

5. On June 1, 2023, The Wilderness Society, represented by the Southern Environmental Law Center, filed petitions seeking review of decisions of both the United States Forest Service and BLM under 15 U.S.C. §717r(d)(1). No. 23-1592, Doc. No. 2; No. 23-1594, Doc. No. 2.

6. On June 3, 2023, President Biden signed into law the Fiscal Responsibility Act of 2023 (“FRA”), Pub. L. No. 118-5. The FRA was a must-pass bill to raise the nation’s debt ceiling and avoid default.

7. The FRA included provisions in Section 324 applicable to the Mountain Valley Pipeline project. FRA §324.

8. On June 5, 2023, Intervenor Mountain Valley Pipeline filed motions to dismiss and motions for summary denial based on provisions in FRA §324 in Petition Numbers 23-1384(L) (Doc. No. 36), 23-1592 (Doc. No. 12), 23-1594 (Doc. No. 11).

9. On June 9, 2023, the Court consolidated The Wilderness Society's petitions for review of the decisions of the United States Forest Service and Bureau of Land Management. No. 23-1592, Doc. No. 19.

10. On June 14, 2023, the various Federal Respondents filed their own motions to dismiss in the Endangered Species Act case (No. 23-1384(L), Doc. No. 41) and the consolidated Jefferson National Forest cases (No. 23-1592, Doc. No. 20).

11. On June 26, 2023, the Endangered Species Act Petitioners and The Wilderness Society filed oppositions to the motions to dismiss their respective petitions. No. 23-1384(L), Doc. No. 43; No. 23-1592, Doc. No. 22.

12. On June 27, 2023, the various Federal Respondents and Intervenor Mountain Valley Pipeline filed notices of their intent to file replies in support of their various motions to dismiss and/or motions for summary denial on July 10, 2023. No. 23-1384(L), Doc. Nos. 45 & 46; No. 23-1592, Doc. Nos. 23 & 24.

13. On July 10, 2023, the various Federal Respondents and Intervenor filed replies in support of their motions. No. 23-1384(L), Doc. Nos. 53 & 54; No. 23-1592, Doc. Nos. 41 & 47.

14. On July 12, 2023, this Court entered an Order consolidating the Endangered Species Act and Jefferson National Forest cases and scheduling oral argument on the pending motions to dismiss for July 27, 2023. No. 23-1384(L), Doc. No. 57; No. 23-1592, Doc. No. 50. From a review of this Court's website, it does not appear that any other cases are set for oral argument in Richmond on July 27, 2023.

15. The consolidated petitions for review involve numerous Federal Respondents, a private party Intervenor, and a total of eleven environmental groups as Petitioners.

16. Thirteen briefs on the pending motions to dismiss and motions for summary dismissal have been presented by the Federal Respondents, Intervenor, the ten Petitioners in No. 23-1394(L), The Wilderness Society, and two sets of amici curiae, although some of those briefs are materially identical. *Compare, e.g.*, No. 23-1592, Doc. No. 12, *with* No. 23-1594, Doc. No. 11.

17. The Petitioners in the Endangered Species Act case (No. 23-1384(L)) are represented by different counsel from the Petitioner in the Jefferson National Forest consolidated cases (Nos. 23-1592 and 23-1594).

18. The pending motions to dismiss and motions for summary disposition present questions of first impression about the meaning and/or constitutionality of five provisions of the recently enacted FRA. The motions present both substantive and jurisdictional questions, including important questions about the respective powers of the judicial and legislative branches.

19. Intervenor has presented the same questions about the same provisions of the FRA to Chief Justice Roberts through its July 14, 2023 *Emergency Application to Chief Justice John G. Roberts, Jr. to Vacate the Stays of Agency Authorizations Pending Adjudication of the Petitions for Review*, No. 23A35 (S. Ct. July 14, 2023), seeking emergency relief from this Court's orders staying the agency actions at issue pending review.

20. Given the number of parties and counsel, the number of important substantive and jurisdictional legal questions, and the fact that the issues to be addressed at the July 27, 2023 oral argument are simultaneously being presented to the United States Supreme Court, Petitioners respectfully submit that a 20-minute oral argument would not be sufficient to allow each party in the consolidated petitions for review to fully present their positions or to ensure a thorough exploration of the questions presented.

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WHEREFORE, extraordinary circumstances in these consolidated petitions for review warrant additional time for oral argument. Petitioners therefore jointly move this Court to expand oral argument to one full hour with 30 minutes (including rebuttal time) allocated to the Movants (Federal Respondents and Intervenor) and 30 minutes allocated to the Petitioners.¹ Such additional time will allow the parties and this Court to thoroughly air the important legal questions presented by the pending motions.

DATED: July 17, 2023

Respectfully submitted,

/s/ Elizabeth F. Benson

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¹ This requested expansion is consistent with the time allotted for oral argument by “[a] majority of circuits,” FRAP 34, notes of advisory committee on rules, and by this Court in en banc arguments, No. 23-1384(L), Doc. No. 59 at 2.

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-limit volume limitation of FRAP 27(d)(2)(A) because this motion contains 1,102 words, excluding the parts of the motion exempted by FRAP 27(d)(2) and FRAP 27(a)(2)(B).

2. This motion complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

DATED: July 17, 2023

/s/ Elizabeth F. Benson

Elizabeth F. Benson

CERTIFICATE OF SERVICE

I hereby certify that, on July 17, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will automatically send e-mail notification of such filing to all counsel of record.

/s/ Elizabeth F. Benson

Elizabeth F. Benson